AR KAVERI ACHI

v.

KASI ARUNACHALAM CHETTIAR

HIGH COURT MALAYA, KUALA LUMPUR
ZAINUN ALI JC
[PROBATE APPLICATION NO: S5-45-241-1987]
17 FEBRUARY 1997

CIVIL PROCEDURE: *Res judicata - Foreign judgment - Issue decided by foreign and local courts*

CIVIL PROCEDURE: *Locus standi - Entry of caveat - Whether can be entered in name of agent of caveator - Whether must be entered in caveator's name*

LAND LAW: *Restraints on dealings - Caveats - Caveatable interest - Whether one caveat sufficient for several caveators - Whether separate caveats necessary - Whether caveat can be entered in name of agent - Rules of the High Court 1980, O. 18 r. 19, O. 71 r. 37*

The applicant ('Kaveri') applied to remove two caveats entered by the respondent acting as the agent of one Ramasamy and of Ramasamy's children, respectively. Kaveri was the sister and main beneficiary under the will of one Alagammai Achi ('Alagammai'), who in turn had been the second wife and main beneficiary under the will of one Chidambaran Chettiar ('Chettiar') in India. Chettiar had had one daughter, Meenakshi (deceased), by his first wife (also deceased). Ramasamy, for whom the respondent acted as agent, was Meenakshi's husband.

Under the terms of Alagammai's will, Kaveri was bequeathed her entire estate. The will however, contained a condition that Kaveri was to adopt and maintain a boy until he attained the age of majority, after which he was to marry Alagammai's niece. At the same time, upon the boy attaining the age of majority, Alagammai's estate was to be divided equally between him and Kaveri.

Alagammai and Meenakshi had, after the death of Chettiar, entered into a memorandum of compromise whereby Meenakshi had acknowledged that Chettiar's will in favour of Alagammai was valid and binding. Meenakshi died in 1984 and Alagammai in 1985. Subsequent to Alagammai's death, her will was challenged but upheld at two levels in the Indian courts and was pending further appeal.

The issue in this application was whether the respondent had a caveatable interest in the land.

Held:

[1] Presumably, Ramasamy's interest flowed from whatever interest Meenakshi had in the estate of her father, Chettiar, and Meenakshi could only sustain an interest in his estate if his will was invalid. In view of the fact that the question of the validity of Chettiar's will had been settled by the memorandum of compromise and recorded in the High Court of Madras, the matter was *res judicata* and the parties were estopped from raising it again.

[2] The matter was also *res judicata* by the fact that the respondent's earlier application to the High Court to have Chettiar's will declared invalid had been struck out and his appeal dismissed.

[3] The respondent's second caveat as agent of Ramasamy and Meenakshi's children was stated as being based on their interest as 'beneficiaries to the movable property of Alagammai if she died intestate' and therefore hinged on the validity of Alagammai's will. Since the will was upheld at two stages in the Indian courts and there was no application for stay pending appeal, there was no interest that could sustain the caveat. The clause concerning the adoption of the boy by Kaveri was not a condition precedent but since the court was of the view that it was unenforceable, Kaveri as residuary legatee inherited the entire estate.

[4] Under O. 71 r. 37 of the Rules of the High Court 1980 ('the RHC'), it is the caveator or his solicitor who enters the caveat in the caveator's name. There is no provision for an attorney to enter a caveat in his own name, as was done in the case of the first caveat. Furthermore, s. 33 of the Probate and Administration Act 1959 stipulates that a caveator must be a person with an interest in the land. In this case, the respondent's only interest was as Ramasamy's attorney.

[5] As for the second caveat, the RHC requires a caveator to state the nature of his interest. Since each caveator might have different interests, it was for each of the children to file a separate caveat stating his/her interest in the land.

[Application allowed with costs.]

Cases referred to:

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(foll)***

Goodhart v. Woodhead 193 1 Ch 749 ***(foll)***

Malayan United Finance v. Noormurni Sdn Bhd [1988] 1 MLJ 395 ***(foll)***

Legislation referred to:

Probate and Administration Act 1959, s. 33

Rules of the High Court 1980, O. 18 r. 19, O. 71 r. 37

[Editor's note: The caveator's appeal vide Civil Appeal No: W-02-79-97 has been dismissed by the Court of Appeal on 24 April 1998.]

For the petitioner/applicant - Shanti Mogan; M/s Shearn Delamore & Co
For the caveator/respondent - Kerpal Singh; M/s U Harcharan & Kerpal

Reported Anne Khoo

JUDGMENT

Zainun Ali JC:

Despite the voluminous papers and apparent intricacy of this matter, the question in issue is simply.

> Whether the applicant can successfully apply to summarily dismiss the two Caveator, one Kasi s/o Arunachalam Chettiar.

This matter arose, from the usual acrimony over property when competing claims between wives happen.

Very briefly the facts appear to be that one Chidambaran Chettiar (Chettiar) executed a Will in India on 12 June 1964 (The 1st Will).

Chettiar had two wives, Meenakshi Achi (senior wife, Achi) and Alagammai Achi (junior wife, Alagammai).

Achi passed away in 1947 and is survived by a daughter named Meenakshi. Chettiar passed away in 1968, appointing Alagammai his Executrix and bequeathed his entire estate, save RS7,000 to Alagammai.

Meenakshi married one Ramasamy. They had four children (Veerappan, Umayal, Valliamai and Meenakshi).

Alagammai executed her will on 12 April 1982 where her sister Kaveri Achi was appointed as her Executrix. Alagammai also bequeathed her entire estate to Kaveri. However there is a condition that Kaveri adopts a boy and maintains him till he attain majority after which he is to he married to Alagammai's niece. At the same time, upon attaining majority one half of the estate shall be handed over to the adopted son and the balance shall be for Kaveri's benefit.

Meenakshi passed away in 1984 followed by Alagamai in 1985.

The First Caveat

The respondent, Kasi (the caveator), acting as agent of Ramasamy filed the first caveat, wherein Ramasamy is stated to be the lawful beneficiary to the estate of Meenakshi.

Presumably, Ramasamy's 'interest' flowed from the interest of Meenakshi (if any), as the natural and lawful daughter from the estate of her father, Chettiar.

Note that Chettiar left a will in which he beguethed almost the entire asset to Alagammai. Therefore the interest in the first caveat can only be sustained by Meenakshi as the lawful daughter of Chettiar if Chettiar's Will is invalid.

The Second Caveat

Kasi filed the Second Caveat as agent to:

(1) Veerappan

(2) Umayal

(3) Valliammai and

(4) Meenakshi

who are issues of Meenakshi and Ramasamy and grandchildren of Chettiar.

The interest of the caveator is once again called into question bearing in mind the status of the estate. The caveator had stated on the caveat that the four person whom he represents are "beneficiaries to the **movable** property of Alagammai (deceased) if she died intestate".

Therefore whether the Applicant can successfully apply to summarily dismiss the two caveats filed by the caveator Kasi s/o Arunachalam Chettiar, would necessarily turn on the question of whether Meenakshi has interest in her father, Chettiar's Will. This in turn provokes the question of whether Chettiar's Will which virtually excluded her, is valid and binding.

The caveator had vigorously argued the validity of Chettiar's Will. His claim is that it is invalid and called forth issues such as testamentary capacity and procedural defect as to tender the Will suspect.

The caveator argued that the Indian Court's decree that Chettiar's Will is invalid cannot be overcome by the Memorandum of Compromise executed between Alagammai and Meenakshi.

The question of Chettiar's Will had been determined and settled in India by the said Memorandum or Compromise where Meenakshi acknowledged and confirmed that the Will executed Chettiar in favour of Alagammai is true, valid and binding.

This fact is already recorded in the Indian Court.

Thus, as far as this court is concerned, in the absence of any other action to set aside a decree of a higher Court in India, the matter is *res judicata* and parties are estopped from challenging the validity of Chettiar's Will.

See *Boustead Trading (1985) Sdn. Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 3 AMR 2871.

Subsequent to filing the first caveat, the respondent, Kasi, filed a Civil Suit to declare the Chettiar's Will was invalid. In this suit, the caveator described Ramasamy's interest as the interest of Meenakshi, (Ramasamy's wife) being the deceased daughter of Chettiar.

The petitioner's (Kaveri Achi) application under O. 18 r. 19 Rules of the High Court 1980, to strike out the Suit was successful. On appeal, the petitioner was again successful in dismissing the appeal before the judge in chambers.

Thereafter, a certificate of no further arguments was given by the judge and no further appeal was lodged.

The failure of the caveator to invalidate Chettiar's Will which was the basis on which the first caveat was lodged, would to my mind, render the caveat ineffectual. This also effectively means that the matter regarding the validity of Chettiar's Will is *res judicata*.

See *Malayan United Finance v. Noormurni Sdn Bhd* [1988] 1 MLJ 395, where the court said that:

> A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined the against him. Even if the objects of first and second actions are different, the finding on a matter which came directly (not collaterally or Incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies ... "the doctrine of *res judicata* is not a technical doctrine applicable only to records, but is a fundamental doctrine of all courts that there must be an end of litigation.

Thus with regard to Chettiar's Will it is unequivocal that the matter is concluded, with the compromise being recorded by way of a decree in the High Court of Madras.

The Second Caveat

With regard to the second caveat, one has to go back to Alagammai's Will since the caveat is hinged on the interest in the estate of Alagammai.

The validity of Alagammai's Will was challenged at two stages in the Indian Courts and at both levels the Will was upheld.

Although the matter is on appeal, this does not operate as an impediment to the beneficiary, to construe it as valid and binding, more so when there is no application for stay pending the appeal.

The only matter which merits consideration in respect of Alagammai's Will is with regard to the clause concerning adoption of a boy whereupon his majority the estate is to be divided in half share between the boy and Kaveri (Alagammai's beneficiary and executrix).

The caveator made much of the 'adoption' clause, arguing that such a clause is unenforceable and is a condition precedent, the non-fulfilment of which would render the entire will invalid.

Upon reading the authorities such as *Goodhart v. Woodhead* 193 1 Ch 749, I would construe the adoption clause as not condition precedent. I would regard that part of the will as unenforceable and Kaveri as the residuary legatee gets the benefit of the bequest.

In any event, the Courts of India at two levels upheld the validity of the will of Alagammai on the ground that the requirement of the adoption of a male son was not a condition precedent to the will taking effect and rendering the will invalid.

Procedural Issues

Foremost in this application lies the question of whether the caveator enjoys any ***locus standi.***

Order 71 r. 37 of the Rules of the High Court 1980 make reference to Form 173 in the High Court Rules. This form requires either the caveator or his solicitor to enter a caveat. There is no provision for the attorney to enter a caveat in his own name. Moreover if a solicitor enters a caveat on behalf of the caveator, it is the caveator's name which has to be put in the body of the caveat, not the name of the solicitor or attorney as in this case.

More importantly, s. 33 of the Probate and Administration Act, stipulates that a caveator must be a person with an interest. And therein lies the problem, for I cannot see where the caveator derives his interest

The caveators as agent of Ramasamy surely cannot claim to have an interest in the estate of the deceased except as a attorney.

The principle is that only a person with interest can file a caveat. Thus going back to the issue at hand, it is precisely because the caveator and plaintiff in Suit No. S6-22-318-88 had no ***locus standi*** and no interest in the Will, that the caveat filed by the caveator cannot be sustained.

Secondly the court's decision then establishes that there has been no declaration by the Malaysian court that Chettiar's Will is invalid.

It follows therefore that the matter of the validity of Chettiar's reinforces Alagammai's interest in the estate of Chettiar. This is further fortified by the Indian Court decision which confirms Alagammai's Will.

With regard to the question of procedure in the second caveat, the caveator filed the caveat on behalf of various persons. In other words, various interests are being represented in one caveat.

Quite apart from the substantive departure that only a person with interest lodges a caveat, the Rules of the High Court requires the caveator to state the nature of his interest. Surely each caveator may have different or differing interests, and needless to say it is for each one of them to file a separate caveat.

The deviation of the caveator in this connection has the undesirable effect of making the nature of the caveator unclear. More importantly, it has the effect of preventing the extraction of probate.

Based on the foregoing I find no basis to question the validity of both Chettiar's and Alagammai's Will.

In that connection, I allow with costs, the application to set aside the first and second caveats, with immediate effect.